SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 230.

ANTONIO ORTEGA, PLAINTIFF IN ERROR,

vs.

ANGELA LARA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff below, Angela Lara, defendant in error here, sued Antonio Ortega, the plaintiff in error here, in the district court of the United States for the District of Porto Rico to recover damages in the sum of ten thousand dollars ($10,000), alleged to have been suffered by her by reason of his breach of promise of marriage.

The complaint was filed October 14, 1904 (1), and on November 23, 1904, defendant appeared and demurred to the proceeding (2, 3). His demurrer having been overruled, on December 13, 1904, he answered by pleading the general issue (3), and, upon issue joined before the honor-

able district judge and a jury, verdict was rendered January 5, 1905 (4), and judgment was entered January 6, 1905 (5), in favor of the plaintiff and against the defendant "in the sum of $5,000" (5).

It is averred in the declaration that both plaintiff and defendant "are subjects of the King of Spain and residents of Porto Rico" (1); that on or about the first of June, A. D. 1900, the plaintiff, being then *sole* and unmarried, at the request of defendant promised to marry him, on request, and the defendant promised to marry her within a reasonable time (1); that plaintiff, confiding in said promise, has since remained *sole* and unmarried, ready and willing to marry the defendant, but the defendant, contrary to his said promise, in the year 1904 married a certain other person, to plaintiff's damage in the sum of $10,000 (2).

By his demurrer the defendant contended:

First. That the complaint did not state a cause of action within the jurisdiction of the court.

Second. That the complaint did not state a cause of action under the laws of Porto Rico (2).

Upon argument this demurrer was overruled by the court (3), and thereupon the defendant pleaded "that he never promised to marry the plaintiff," and two special pleas, which, however, he did not undertake to establish by proofs and which are conceded by the brief for the plaintiff in error not to be material to any of the issues before this court (Brief for P. E., p. 2).

The case came on for trial, and, a jury having been duly impaneled and sworn (4), evidence was introduced by each party, and the jury, having been instructed by the court upon the law of the case and having considered of their verdict, returned the same as follows:

"We, the jury, assess the damages in favor of the plaintiff in the sum of $5,000 (five thousand dollars)" (4).

On the next day, January 6, 1905, judgment was entered upon the verdict in favor of plaintiff "for the sum of five thousand dollars ($5,000), with interest thereon at six per cent. (6%) per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, to be taxed by the clerk" (5).

On January 16, 1905, ten days after the judgment in favor of the plaintiff had been duly entered of record and eleven days after verdict, the defendant filed a motion in arrest of judgment (5, 6) and a motion for judgment *non obstante veredicto* (6, 7).

To the filing of each of said motions "exception was duly taken by the plaintiff," and said motions, having been argued and considered by the court, were on the 20th day of January, 1905, overruled (7).

To the action of the court in overruling such motions the defendant excepted (7).

On the same day, defendant having assigned errors and petitioned for the allowance of a writ of error from this court to review the above judgment, the petition for the writ of error was allowed, to act as a supersedeas upon the giving of bond in the sum $8,000, "with good and sufficient sureties to be approved by the clerk (7).

The transcript of record does not contain the copy of any bond and, so far as now apepars, the writ of error has not been perfected by compliance with the statutory requirements in that regard.

The bill of exceptions does not contain all of the evidence given in the course of the trial, but, on the contrary, it purports to contain only "the substance of all the material evidence in the case" (19).

In her own behalf plaintiff introduced in evidence thirteen letters, which were admitted by the defendant as having been written by him to the plaintiff (10-15).

To the introduction in evidence of six of these letters, numbered from 1 to 6, inclusive, defendant objected "on the ground that they were dated in the year 1894 without any offer on the part of the plaintiff to show any connection between said letters and those of more recent date" and because the dates of said letters "were too remote from the date of the contract as alleged in the declaration" (16).

These objections were overruled by the court, and its action in that regard was duly excepted to by defendant. This exception forms the basis of assignment of error numbered II.

Plaintiff testified that she had known defendant since 1893; that he had professed love for her; had spoken to her of marriage and of the time when they would marry; that their engagement was formally made; that defendant had with her permission written a letter to her father (No. 7, R., p. 12), asking his permission to call upon her at the house, and at the same time defendant gave her his promise to marry her; that she had never consented to the breaking off of the engagement to marry defendant, which had been made known to her friends and was generally known publicly; defendant first promised to marry her in 1899 and renewed his proposal in 1900, when she accepted his proposal and his engagement ring; defendant then said he would marry her during the ensuing year, but from time to time gave various excuses for postponing the ceremony (16).

Fernando de Lara, father of plaintiff, testified that he had known defendant for six or seven years; that in 1899, a few days after receiving from the defendant one of the letters introduced in evidence, he requested him to call at his house, and, having referred to said letter, defendant affirmed his intention of marrying plaintiff and promised witness to marry her the following year (17).

The defendant Ortega, called as a witness, admitted that he had known the plaintiff for more than ten years; that

he had visited her occasionally, not "as the fiancé of the plaintiff, but for the purpose of finding out whether plaintiff would suit him for a wife and whether he loved her, but he never spoke to her of matrimony;" that on one occasion he had told plaintiff's father that "he had the best of intention, but could make no promises, because he needed to know plaintiff better and (to) see whether they agreed in character and would make a happy couple;" that he left Porto Rico in June, 1904, for New York and Europe and married, in Spain, October 6, 1904, just before returning to Porto Rico (10); that "SEVERAL TIMES BEFORE LEAVING FOR NEW YORK WITNESS TALKED WITH THE PLAINTIFF ABOUT THEIR COURTSHIP FOR THE PURPOSE OF BRINGING THE SAME TO AN END BEFORE HIS DEPARTURE, BUT NO DEFINITE CONCLUSION WAS ARRIVED AT" (18).

At the conclusion of the evidence defendant moved the court to instruct the jury to return a verdict in his favor because—

1st. No damages recognized by the law had been proven.

2d. Because the court has no jurisdiction of a suit where both plaintiff and defendant are subjects of the King of Spain.

3d. Because the cause of action in suit arose in June, 1900, "at which time there was no provision in the laws in force in Porto Rico for a suit of the character set out in plaintiff's declaration, the only basis for the said suit being the provisions of article 44 of the Civil Code then in force."

which motion was overruled and exception to such action was duly noted (19). Upon this exception is based assignment of error numbered III (8).

Thereupon, at plaintiff's request, the court instructed the jury that the testimony showed beyond reasonable doubt

that there was a promise and contract of marriage, and that their entire consideration "of the case should be confined to the question of damages, if any have been sustained by the plaintiff;" to which ruling defendant excepted (20), and this exception forms the basis of assignment of error numbered IV (9).

Assignment of error numbered I relates to the overruling of defendant's demurrer to the declaration, while number VI and VII relate to the overruling of the motions in arrest of judgment and for judgment *non obstante veredicto* respectively (9). Assignment of error number V, being merely that the court erred in entering judgment in favor of the plaintiff and against defendant, is too general to require discussion.

ARGUMENT.

The questions presented for the consideration of this court are:

First. The jurisdiction of this court to review the judgment of the trial court.

Second. The jurisdiction of the trial court to entertain the suit.

Third. If the requisite jurisdiction be found, does the transcript of record present reversible error?

FIRST.

Apart from the question as to whether this court has jurisdiction of this cause on its merits, it is submitted that the plaintiff in error ought not to be allowed to prosecute further the writ of error herein because of his failure to per-

fect said writ of error by giving bond, as required by the Revised Statutes of the United States, section 1009.

Boyce *vs.* Grundy, 6 Peters, 777.
First National Bank *vs.* Omaha, 96 U. S., 737.
Dodge *vs.* Knowles, 114 U. S., 430.
Gallaway *vs.* State National Bank, 186 U. S., 177.

It is not within the power of the trial judge to delegate the approval of such bonds to the clerk of the court, as was sought to be done in the case at bar (7).

O'Reilly *vs.* Edrington, 96 U. S., 724.
First National Bank *vs.* Omaha, 96 U. S., 737.
Haskins *vs.* St. Louis, &c., R. Co., 109 U. S., 106.

This court is also without jurisdiction to review the judgment of the lower court because—

1st. The matter in dispute, exclusive of costs, does not exceed the sum of $5,000.

2d. During the course of the trial neither the Constitution of the United States nor a treaty thereof nor an act of Congress was brought in question and the right claimed thereunder denied.

The judgment herein was for $5,000, with interest and costs. Apart from so-called Federal questions in an action for money, the amount of the judgment against the defendant is the measure of the jurisdiction of this court, and such jurisdiction cannot be maintained unless the judgment exceeds $5,000.

Mayor, &c., of Troy *vs.* Evans, 97 U. S. (7 Otto), 1.

Neither interest nor costs of suit can enter into the computation.

Western Union Tel. Co. *vs.* Rogers, 93 U. S. (3 Otto), 565.

Plaintiff in error concedes that the amount in dispute is not sufficient to support the jurisdiction of this court (Brief P. E., 6), but insists that "a *bona fide* question" of Federal law is involved, in that he was unjustly deprived by the trial court of the benefit of the provisions of section 44 of the "former Civil Code of Porto Rico," which had been continued in force by virtue of the provisions of section 8 of the act of Congress of April 12, 1900, called the Foraker act.

Section 44 of the "former Civil Code of Porto Rico" related to breaches of promise of marriage, and declared that under certain conditions "the person who refuses to marry without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage."

This law of Porto Rico, being in force on April 12, 1900, was by section 8 of the Foraker act continued in force "until altered, amended or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States."

As so continued it was in force June 1, 1900, the alleged date of the promise of marriage between the parties to the suit.

Subsequent to June, 1900, and prior to October, 1904, the date of the alleged breach—that is to say, in 1902—the legislature of Porto Rico enacted a new Civil Code, which is known as "The Civil Code of Porto Rico," and became effective July 1, 1902.

By the "Final Provision" of "The Civil Code of Porto Rico" the former "Civil Code and all other laws or bodies of law which directly or indirectly are in conflict with the provisions of this revised Civil Code" were repealed and left without force or effect, "both as laws directly binding and as supplementary laws."

This provision directly repealed section 44 of the prior Civil Code upon the continued existence or effect of which plaintiff in error now relies to maintain the present writ of error.

In addition to said section 44 now repealed the Civil Code in force prior to 1902 contained the following captions and articles thereunder:

Book Fourth.—Obligations and Contracts.

Title I.—Obligations.

Chapter First.—General Provisions.

Article 1088. Every obligation consists in giving, doing, or not doing something.

Article 1089. Obligations are created by law, by contracts, by quasi-contracts, and by illicit acts and omissions or by those in which any kind of fault or negligence occurs.

Article 1093. Those (obligations) arising from acts or omissions, in which faults or negligence, not punished by law, occur, shall be subject to the provisions of chapter second of title sixteen of this book.

Title XVI.

Chapter Second.—Obligations which Arise from Fault or Negligence.

Article 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

These four articles have been carried into and now form a part of the Revised Code of 1902 in the very words above quoted.

See sections 1055, 1056, 1060, and 1803 of The Civil Code of Porto Rico, 1902.

Prior to the Revised Code of 1902 the law in force in Porto Rico recognized two forms of marriage, the canonical and the civil. Each form when effected constituted a "contra-

to solemne"—that is, a contract required by law to be made with peculiar solemnity or in a particular form. As such they correspond with our formal contracts for the transfer of title to or an interest in real property, and are distinguishable from "contratos consensuales," which arise from the mere assent of the parties, and may be evidenced by word of mouth, without formal writings.

By section 129 of the Revised Code of 1902 marriage is declared to be "a civil institution originating in a civil contract, whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law," &c., &c.

It thus appears that both at the date of the promise of marriage between the parties at bar and at the date of the breach thereof, in October, 1904, marriage was an institution originating in contract, and for the breach of the contract (promise) to marry an action would lie.

Articles 43 and 44 and 1088, 1089, 1093, and 1902 of the former Civil Code.

Articles 1055, 1056, 1060, and 1803 of the Civil Code of 1902.

Section 6 of Code of Civil Procedure of Porto Rico, approved March 10, 1904; in force July 1, 1904.

The sole difference in the law governing an action for a breach of promise of marriage where the breach occurred prior to 1902 and that governing such an action for a breach occurring subsequent to that year grows out of the repeal of section 44 of the old Civil Code to the effect that—

"If the promise has been made in a public or private instrument * * * or when the banns have been published, the person who refuses to marry, without just cause, shall be obliged to indemnify the other party for the expenses which he or she may have incurred by reason of the promised marriage. An action to recover indemnity for the expenses to which the foregoing article refers may be instituted only within a year, counted from the day of the refusal to celebrate the marriage."

As it does not appear from the record that the promise in the case at bar was either made in a public or private instrument, or that the banns had been published, it would seem that this section which provided for the recovery of special indemnity in cases where "expenses" had been incurred had no bearing. In any event, it is nowhere intimated that the right of the injured party, where the promise had been evidenced by special formalities, to sue for and recover "expenses" was exclusive of the right in the same party to sue for and recover other damages suffered by reason of the breach (art. 1902, Civil Code of 1889). The right to recover "expenses" which had been incurred under the specially enumerated conditions was in addition to and not in derogation of the common rights and obligations incident to the making and breaching of contracts *inter partes*. It would be strange indeed if a promisee in the case of a contract of purchase or a lease, easement, or mortgage should have greater rights in compelling compensation for damages flowing from a breach of such a contract than would the promisee in the case of a broken promise or contract to marry.

This, however, seems to be the contention of the plaintiff in error, who insists that the refusal of the trial court to limit the plaintiff's right of recovery by the express terms of said section 44 amounted to the denial of a right claimed under a statute of the United States.

Where the amount in dispute does not exceed $5,000, to give this court jurisdiction it must appear that a real and not a fictitious Federal question is involved. It is not enough that the plaintiff in error shall have asserted that a Federal question was raised in the course of the trial, but it must appear that the alleged Federal question is of a substantial character.

If it should be conceded that prior to 1902 the sole remedy of an injured party in such a case as this was an action to

recover "expenses," it is certain that no such restriction existed subsequent to that date. The right of the legislature to alter and enlarge the remedy for a breach occurring prospectively cannot be doubted. The rights of the parties to the contract were not altered; the remedy accorded for a breach if its obligation alone was affected. It the case at bar no cause of action is asserted as arising from the promise or agreement to marry, but only from the refusal to perform. The refusal to perform is the fact which gave rise to and supports the action, and the law governing the results of such refusal must be that in force when the refusal occurred. This conclusion results from the following considerations: The promise of marriage by itself in the absence of a breach thereof would not give rise to an action for damages either limited or general. In general actions existing but not instituted are governed by the laws in force at the time of their institution and not by prior laws. The laws of procedure or adjective laws may have retroactive effect in that they may be applicable to cases existing under prior laws, but not yet submitted to the jurisdiction of any court. In cases of specific performance of contracts and the like it is plain that the laws in force at the time of the making of the contract alone must determine the outcome, but in actions to recover damages for the breach of contracts not compulsorily executable the right to maintain such action and the measure of the damages depends upon the law in force at the time the fact—*i. e.*, the breach—giving rise to the right of action occurs.

The parties to a contract have no vested right in the existing general laws of the State which can preclude their amendment or repeal. While it is true that there may be laws which when accepted by an individual constitute in themselves binding contracts which probably could not be altered by subsequent legislation, it is settled in the United States that the laws governing the institution of marriage and the dissolution of the condition are not of this class.

Maynard *vs.* Hill, 125 U. S., 190.

Changes in the laws of evidence, of perjuries and registrations, and those which concern remedies, frauds, and limitations of actions, while they may affect the validity, construction, or discharge of contracts, are not regarded as necessarily affecting their obligation.

Sturges *vs.* Crowninshield, 4 Wheaton, 122, 200.

Cooley's Constitutional Limitations, 7th ed., 406 *et seq.*

By section 8 of the Foraker act, article 44 of the old Civil Code was only continued in force until altered, amended, or repealed by the legislature of Porto Rico. More than two years prior to the institution of the present suit it had been expressly repealed by the Civil Code of Porto Rico of 1902. To suggest that it survived for the purposes of this suit and that the refusal of the trial court to be bound thereby amounted to the denial of a right claimed under that act of Congress would seem to be the assertion of a fictitious Federal question, which for lack of substance cannot support the writ of error.

SECOND.

But if the court should think otherwise, then we submit that the objection to the jurisdiction of the trial court is not well founded.

The complaint asserts that both parties to the cause are subjects of the King of Spain and residents of Porto Rico. Section 3 of the act of Congress of March 2, 1901 (31 Stats. L., 953), declares that the jurisdiction of the district court of the United States for Porto Rico in civil cases shall * * * extend to and embrace controversies where the parties or either of them are * * * citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interests or costs, the sum or value of one thousand dollars.

As the case at bar is clearly comprehended by the express words of this act, further discussion of this point would seem to be unnecessary.

THIRD.

Assuming that the district court had jurisdiction of this cause, and that this court has jurisdiction to review the judgment of the former on writ of error, it would seem that the matters of error now relied upon to secure a reversal of that judgment are as follows:

a. Because the complaint did not set forth facts sufficient to constitute a cause of action under the laws of Porto Rico.

b. Because of the admission in evidence of the letters numbered from 1 to 6, inclusive.

c. Because the trial judge instructed the jury peremptorily in favor of the plaintiff in so far as the right to recover against defendant was concerned.

d. Because of the overruling of the motions in arrest of judgment and for judgment *non obstante veredicto*.

a.

At the date of the institution of this suit matters of procedure in the courts of Porto Rico were regulated and controlled by the Code of Civil Procedure of Porto Rico approved March 10, 1904, in effect from and after July 1, 1904.

Section 6 of said Code expressly recognizes the right of an injured party to maintain an action for breach of promise of marriage.

By section 101 pleadings on the part of the plaintiff are limited to (1) the complaint and (2) the demurrer to the answer. On the part of the defendant to (1) the demurrer to the complaint and (2) the answer—

Section 103 provides that the complaint must contain (1) caption and title, (2) "a statement of facts constituting the cause of action, in ordinary and concise language," and (3) a demand for the relief claimed.

Section 122 requires that in construing a pleading "for the purpose of determining its effect its allegations must be liberally construed with a view to substantial justice between the parties."

Section 123 provides for the striking of redundant matter from pleadings, and section 124 requires the court "in every state of an action (to) disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affirmed by reason of such error or defect."

In actions for breach of promise the only issuable facts are—

(1) The promise to marry.

(2) The terms, if any.

(3) The breach.

Any averments of facts or circumstances in addition to the above would be redundant.

McCarville *vs.* Boyle, 89 Wisconsin, 651.

The complaint here asserted (1) the promise of plaintiff to marry defendant (2) within a reasonable time in consideration of the promise of plaintiff to marry defendant upon request, (3) the defendant's breach by his marriage to another in 1904, and concludes with a demand for damages in a sum certain. It is submitted that this complaint fully complies with all requirements of the laws of Porto Rico and well states a cause of action within their purview.

b.

The letters numbered from 1 to 6, inclusive, were properly introduced in evidence. The sole objection urged to their admissibility is that they were long prior in date to the alleged promise of marriage between the parties, and no connection between them and the letters of more recent date was shown.

But the defendant admitted the authenticity of the letters and his continued acquaintance with plaintiff from their dates to the time of trial. The letters were admissible in evidence as tending to show the state of his feelings, or at least his representations thereabouts, for the plaintiff long prior to the day when she yielded to the persistent pressure of his attentions. No attempt was made on the part of the defendant to show that his state of mind had altered between the date of those letters and the date of his becoming engaged to their addressee.

It is true that no offer was made on the part of the plaintiff to introduce any letters received by her between 1894 and 1900 or to show the connection, if any there was, between those of the earlier and those of the later date. But it may well be that the letters produced by plaintiff were all that ever passed between the lovers, and in any event it was incumbent upon the defendant to demand the introduction of the entire correspondence if its partial introduction affected him disadvantageously.

That the letters introduced antedated the alleged promise of marriage is of no consequence.

Richmond *vs.* Roberts, 98 Illinois, 472.

c.

The peremptory instruction of the trial court in favor of the plaintiff was fully justified by the state of the evidence.

There is no conflict in the evidence upon the material fact as to the existence of an "understanding" or engagement of marriage between the parties.

In his letter of June, 1902 (number 7), to Senor Lara defendant expressly declares the existence of "a certain understanding" between himself and the plaintiff, Angela, which he deems it his duty to make known to the father, and, "duly authorized by her," he requests permission to visit the dwelling-house at opportune times (12). In his letter of September 10, 1903 (number 11), to Senor Lara he informs him that he deems it his duty "to make a parenthesis in my (his) relations with your daughter Angelis, and to consider them as terminated" so as not to prejudice her "for any longer time by keeping her in such an indefinite state of affairs," saying that "I could not make her happy in my actual condition, and with great pain in my heart I deprive myself of her affection, which has always been to me so ineffable" (14).

On the stand as a witness in his own behalf he admitted the existence of an engagement of marriage between them, at least impliedly, when he testified that prior to leaving for New York on several occasions he had "talked with the plaintiff about their courtship for the purpose of bringing the same to an end before his departure, but no definite conclusion was arrived at" (18). It might well be that defendant had never spoken to plaintiff "of matrimony" in the abstract, and yet an engagement of marriage had existed between them. The bill of exceptions does not purport to contain the entire testimony, but if it were otherwise, still the action of the trial judge here complained of would have been fully justified.

Patillo *vs.* Allen-West Commission Co., 131 Fed. Rep., 680, 686.

Citing

Southern Pacific Co. *vs.* Pool, 160 U. S., 438, 440.

Union Pacific Railroad Co. *vs.* McDonald, 152 U. S., 262, 283.

Delaware, &c., Co. *vs.* Converse, 139 U. S., 469, 472.

d.

The motions in arrest of judgment and for judgment *non obstante veredicto*, if they were made in due season, do not present any other supposed grounds of error than those above discussed. Hence, if they had been filed in time, they were without merit and were properly overruled. As it was, they were attempted to be made against the protest of plaintiff after judgment had been entered of record and after the expiration of ten days supposed to be allowed by the rules of court for such purpose.

In the absence of a statute or rule of court to the contrary, motions in arrest of judgment must always be made before judgment.

State *vs.* Kibbling, 63 Vermont, 636.
Keller *vs.* Stevens, 66 Maryland, 132.
Hilligoss *vs.* Pittsburgh, &c., Co., 40 Indiana, 112.
Patter *vs.* McCormick, 127 Indiana, 439.

And so is it also with motions for judgment *non obstante veredicto*.

Scheible *vs.* Hart (Kentucky), 12 S. W. Rep., 628.
State *vs.* Commercial Bank, 6 Smed. & M. (Miss.), 218.
Harrison *vs.* Great Northern, &c., Co., 11 C. B., 542.
Beatty *vs.* Warren, 4 M. & G., 158.

This writ of error should be dismissed for the want of jurisdiction on the part of this court, or if not, then the judgment of the lower court should be affirmed.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
T. D. MOTT, JR.,
Attorneys for Defendant in Error.